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Products Liability of Successor Corporations: A Policy Analysis

When a corporate acquisition is structured as an acquisition of assets rather than as a merger, consolidation, or stock purchase,¹ the traditional corporate law rule is that the acquiring corporation (the "successor") is not liable for the debts and liabilities of the acquired corporation (the "predecessor").² The successor corporation is liable, however, if the asset acquisition comes within one of four generally accepted exceptions: there was an express or implied agreement to assume the liabilities;³ the transaction sufficiently resembled a merger to be considered a de facto merger;⁴ the successor was sufficiently similar to the predecessor to be considered a mere continuation of the latter;⁵ or the transaction was fraudulent.⁶ For corporate planners, the ability to structure a corporate acquisition as an asset acquisition, thus avoiding liability, is an obvious benefit of this traditional rule. For products liability plaintiffs, however, the traditional rule is an undesirable obstacle to the recovery of compensation for their injuries. If the corporation that manufactured the injury-causing product no longer exists, having liquidated after selling its assets to another corporation, the plaintiff may be unable to recover at all unless he can recover from the successor corporation.⁷ The traditional rule is likely to prevent such recovery.⁸

Recent courts have ventured beyond the traditional rule of successor nonliability to allow products liability plaintiffs to recover against successor corporations for injuries caused by products manufactured by their

¹ If the acquisition is a merger or consolidation, the acquiring corporation may be required to assume the liabilities of the acquired corporation by the merger or consolidation statute, e.g., ABA-ALI MODEL BUS. CORP. ACT §§ 65-70 (rev. ed. 1976), or under case law, see cases cited FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7121 n.1 (1973). If the acquisition is structured as a stock purchase, the acquiring corporation becomes responsible for the liabilities of the acquired corporation only to the extent of its ownership interest. Comment, *Successor Liability in Corporate Acquisitions—An Examination of Attempts to Limit the Use of the De Facto Merger Doctrine*, 46 J. AIR L. & COMMERCE 483, 485 (1981).

² FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 n.1 (1973), provides a comprehensive list of cases applying this rule.

³ *Id.*

⁴ *Id.* For a discussion of the de facto merger doctrine, see 1.6 D. HERWITZ, BUSINESS PLANNING, 697-723 (1966).

⁵ FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (1973).

⁶ *Id.*

⁷ For a discussion of the difficulties a products liability plaintiff faces in attempting to recover from a dissolved corporation, see *infra* note 64.

⁸ E.g., *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817 (D. Colo. 1968); *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 264 A.2d 98 (1970), *aff'd*, 118 N.J. Super. 480, 228 A.2d 585 (1972).

predecessors. Several courts have allowed recovery by expanding the de facto merger⁹ and mere continuation exceptions.¹⁰ In 1977 the Supreme Court of California abandoned the traditional rule and its exceptions and created a new rule referred to as the "product-line rule."¹¹ The product-line rule has been adopted by some jurisdictions¹² and rejected by others.¹³

This note will evaluate the expansion of successor products liability in the context of asset acquisitions, focusing on the policy rationales of the traditional rule and those of strict products liability. Following a brief discussion of some important recent cases, these policy rationales will be examined to determine the extent to which they support each of several alternative solutions to the successor liability issue.

SUCCESSOR LIABILITY CASES

In *Turner v. Bituminous Casualty Co.*,¹⁴ the Michigan Supreme Court adopted a rule of successor liability based on continuity of the enterprise.¹⁵ In *Turner*, the plaintiff was injured by a power press manufactured by the defendant corporation's predecessor. The successor acquired the predecessor's assets with cash and continued to manufacture the same product under the same name, using the predecessor's physical plant and management. The successor defendant argued that it was protected by the traditional corporate rule of nonliability because the transaction did not come within the de facto merger exception; the consideration was cash, rather than stock in the successor corporation.¹⁶

The Michigan court rejected the defendant's argument, reasoning that it was illogical that a successor corporation's liability for its predecessor's products depended on whether the acquisition was for cash or stock.¹⁷ By eliminating the requirement that the successor corporation's stock be used as consideration in the transfer of assets, the court in *Turner* expanded the de facto merger exception.¹⁸ This departure from the traditional de facto

⁹ *E.g.*, *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976), discussed *infra* notes 14-19 and accompanying text. *Cf.* *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 800-01 (W.D. Mich. 1974) (more traditional interpretation of de facto merger exception).

¹⁰ *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974). *Cf.* *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 563, 264 A.2d 98, 106 (1970) (traditional interpretations of mere continuation exception).

¹¹ *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977), discussed *infra* notes 20-23 and accompanying text.

¹² See case cited *infra* note 34.

¹³ See cases cited *infra* note 35.

¹⁴ 397 Mich. 406, 244 N.W.2d 873 (1976).

¹⁵ *Id.* at 410, 244 N.W.2d at 875.

¹⁶ This was the only aspect of the *Turner* transaction that prevented it from fitting the traditional de facto merger exception. For a statement of the other requirements of a de facto merger, see *infra* note 18.

¹⁷ See *Turner*, 397 Mich. at 421-22, 244 N.W.2d at 879-80.

¹⁸ See *id.* at 430, 244 N.W.2d at 883. The court retained the other three elements of a de facto merger:

(1) There is a continuation of the enterprise of the seller corporation, so that

merger exception was justified by policies of strict products liability.¹⁹

In *Ray v. Alad Corp.*,²⁰ the Supreme Court of California expanded successor liability by creating a new exception to the traditional rule of nonliability, rather than by expanding the scope of one of the existing exceptions. The relevant facts in *Alad* were the same as those in *Turner*.²¹ The California court upheld the successor corporation's liability under a new exception to the traditional rule: the "product-line rule." Under this rule a successor corporation is liable for injuries caused by its predecessor's product lines that the successor continues to manufacture.²² The California court enumerated three justifications for the product-line rule: the plaintiff had virtually no chance of recovering from the predecessor; the successor had virtually the same ability as the predecessor to estimate the risks of product liability claims, to insure against them, and to pass on the costs of insurance or damages paid to purchasers of the product; and since the successor enjoys the benefits of the predecessor's goodwill, fairness requires that he should bear the burden of product claims as a necessary incident to the benefits from the goodwill.²³

Although the courts in both *Turner* and *Alad* found successors liable for their predecessors' products under similar factual situations, they adopted

there is a continuity of management, personnel, physical location, assets, and general business operations. . . .

(3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves when legally and practically possible.

(4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Id. at 420, 244 N.W.2d at 879 (quoting *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801 (W.D. Mich. 1974)).

¹⁹ The court reasoned that the traditional rule had developed to protect creditors and shareholders rather than products liability plaintiffs, and was "not applicable to meeting the substantially different problems associated with products liability." Citing *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974), the court in *Turner* based successor liability on the successor's superiority over the consumer in calculating the risk of defects, insuring against the cost of product-related injuries, and improving product quality. 309 Mich. at 425, 244 N.W.2d at 881. The court further supported successor liability with an estoppel theory: a successor corporation that represents itself as the same company as its predecessor should be estopped from denying that it is in fact the same company when a claim based on a product manufactured by the predecessor arises. *Id.* at 426, 244 N.W.2d at 882. The *Turner* court dismissed the defendant's contention that the new rule would have an adverse economic impact on corporate transactions, stating that "once corporations considering such transactions become aware of the possibility of successor products liability, they can make suitable preparations." *Id.* at 430, 244 N.W.2d at 883.

²⁰ 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

²¹ The predecessor dissolved soon after the transaction, the consideration was cash, the manufacturing operation continued unchanged, and the same corporate and trade names were used. *Id.* at 26-27, 560 P.2d at 6, 136 Cal. Rptr. at 577.

²² *Id.* at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.

²³ *Id.* at 31, 560 P.2d at 8-9, 136 Cal. Rptr. at 579-80. The court in *Alad* also noted that the product-line rule would prevent the predecessor from realizing a windfall by selling its business at a price higher than its true value. It would also prevent the predecessor from avoiding responsibility for injuries caused by its defective products, because the predecessor would pay for them through a reduction in the price for which it could sell its assets. *Id.* at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.

different rules. The *Turner* rule emphasizes "continuity of management, personnel, physical location, assets, and general business operations,"²⁴ whereas the *Alad* rule emphasizes product line continuity.²⁵ In *Ramirez v. Amsted Industries*,²⁶ the Supreme Court of New Jersey adopted the *Alad* product-line rule, emphasizing the difference between the *Turner* rule and the *Alad* rule.²⁷ Although the New Jersey court found that the defendant successor corporation could be held liable under either rule, it chose to adopt the *Alad* rule, because such an approach totally abandoned the traditional corporate rule and was based entirely on strict liability policy.²⁸

In *Nieves v. Bruno Sherman Corp.*,²⁹ the Supreme Court of New Jersey extended the product-line rule to a different factual situation. *Nieves* involved two defendants, Harris Corporation and Bruno-Sherman Corporation. A defective power press injured the plaintiff in 1975. The manufacturer of the defective press sold all its assets to defendant Harris in 1964. Harris continued the product line until it sold the assets related to this product line in 1972 to Bruno-Sherman, which continued the power press line. Harris remained a viable corporation, continuing to manufacture another product line.³⁰ The New Jersey court upheld Harris Corporation's liability, reasoning that the product-line rule supported the liability of an intermediate successor corporation which neither made the specific defective product at issue nor was manufacturing the same product line at the time of the injury.³¹ The court also recognized the possibility of another

²⁴ *Turner*, 397 Mich. at 420, 244 N.W.2d at 879.

²⁵ The *Alad* opinion does not clearly define the court's rule. It states that a successor which continues the product line "under the circumstances here presented assumes strict tort liability for defects in units of the same product line." 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582 (emphasis added). Thus, the *Alad* rule can be narrowly construed as requiring all the *Turner* continuity factors, as well as product line continuity, as all these factors were present in the circumstances of *Alad*. The *Alad* rule, however, has generally been construed more broadly as requiring product line continuity without requiring the other *Turner* continuity factors. See, e.g., *Ramirez v. Amsted Indus.*, 86 N.J. 332, 431 A.2d 811 (1981). But see *Jacobs v. Lakewood Aircraft Serv., Inc.*, 512 F. Supp. 176, 182-85 (E.D. Pa. 1981) (successor must also "hold itself out as the same manufacturing enterprise"); *Rawlings v. Oliver*, 97 Cal. App. 3d 890, 894, 159 Cal. Rptr. 119, 120 (1979) (successor liable although it did not continue identical product line).

²⁶ 86 N.J. 332, 431 A.2d 811 (1981).

²⁷ The New Jersey court adopted the broader of the two possible interpretations of the product-line rule discussed *supra* note 25. According to the court in *Ramirez*, the *Turner* rule focuses on continuity of the corporate entity, while the *Alad* rule "is concerned not with the continuation of the corporate entity as such but rather with the successor's undertaking to manufacture essentially the same line of products as the predecessor." *Id.* at 347, 431 A.2d at 819.

²⁸ The court in *Ramirez* used the same three strict liability policy factors as the *Alad* court. See *supra* text accompanying note 23.

²⁹ 86 N.J. 361, 431 A.2d 826 (1981).

³⁰ *Id.* at 366, 431 A.2d at 828-29.

³¹ *Id.* at 365, 431 A.2d at 828. According to the court, this result was justified because of Harris' role in the destruction of the plaintiff's remedy against the original manufacturer and because Harris was "an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products." *Id.* at 371, 431 A.2d

theory of successor liability, based on a duty to warn owners of a product's known defects.³²

Several other federal and state courts have expanded successor liability following either the *Turner* continuation rule³³ or the *Alad* product-line rule.³⁴ The trend toward expanded successor liability has not been universal, however, as a number of state and federal courts have refused to adopt the *Alad* product-line rule.³⁵ Other courts have upheld the traditional rule of nonliability by refusing to adopt the *Turner* rule or other expansions of the continuation and de facto merger exceptions.³⁶

Courts cite several reasons for being reluctant to expand successor liability. First, questions concerning the social and economic effects of such expansion are better suited to legislative investigation, rather than to case-by-case judicial determination.³⁷ Second, while strict liability is liability without negligence, it is not liability without some responsibility for the plaintiff's injury.³⁸ This responsibility is usually based on the defendant's participation in placing the product in the stream of commerce.³⁹ Holding a successor liable for harm caused by its predecessor's products would violate this basic principle of strict liability as well as common notions of justice and fairness since the successor had nothing to do with the placement of the product into the stream of commerce.⁴⁰ In *Domine v. Fulton*

at 831 (quoting *Ray v. Alad*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582, quoting *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964)).

³² 86 N.J. at 372, 431 A.2d at 832-33. The court did not actually find liability on this theory. It suggested this possibility and remanded for further development of facts relevant to this theory.

³³ *E.g.*, *Bonee v. L & M Constr. Chems.*, 518 F. Supp. 375 (M.D. Tenn. 1981) (applying Ohio law).

³⁴ *E.g.*, *Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (1981).

³⁵ *E.g.*, *Tucker v. Paxson Mach. Co.*, 645 F.2d 620 (8th Cir. 1981) (applying Missouri law); *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir. 1977) (applying Indiana law); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977) (applying Wisconsin law); *Huynh v. Werke*, 90 F.R.D. 447 (S.D. Ohio 1981) (applying Ohio law); *Bernard v. Kee Mfg. Co.*, 394 So. 2d 552 (Fla. Dist. Ct. App. 1981); *Domine v. Fulton Iron Works*, 76 Ill. App. 3d 253, 395 N.E.2d 19 (1979).

³⁶ *E.g.*, *Woody v. Combustion Eng'g, Inc.*, 463 F. Supp. 817 (E.D. Tenn. 1978) (applying Pennsylvania law); *Menacho v. Adamson United Co.*, 420 F. Supp. 128 (D.N.J. 1976); *Nguyen v. Johnson Mach. & Press*, 104 Ill. App. 3d 1141, 433 N.E.2d 1104 (1982). The results in these federal diversity cases and those in *supra* note 35 may have been influenced by the reluctance of the courts to anticipate changes in state law in the absence of any indication that the courts of that state would be inclined to expand successor liability. *See, e.g.*, *Leannais*, 565 F.2d at 441 ("a Federal Court should not impose the policy pronouncements of the Supreme Court of one state upon the citizens of another").

³⁷ *Leannais*, 565 F.2d at 441; *Turner*, 397 Mich. at 453, 244 N.W.2d at 894 (Coleman, J., dissenting). These questions include "[w]hether the mounting costs of such change can be absorbed by insurance, whether product liability costs may grow so high in one state as to encourage business emigration, [and] whether the relationship of workmen's compensation laws to products liability laws should be adjusted." *Leannais*, 565 F.2d at 440 n.7.

³⁸ *Woody*, 463 F. Supp. at 821.

³⁹ *Domine*, 76 Ill. App. 3d at 257, 395 N.E.2d at 23.

⁴⁰ *See Leannais*, 565 F.2d at 441 n.8; *Woody*, 463 F. Supp. at 820.

Iron Works,⁴¹ the Appellate Court of Illinois justified its refusal to expand successor liability by referring to two strict liability policies not mentioned in *Alad*: the implied representation of product safety and the improvement of product safety. The Illinois court reasoned that the successor corporation made no representation concerning the safety of its predecessor's products and was unable to improve their safety. Consequently, the successor should not have been liable for the harm the product caused.⁴² Some courts which have refused to expand successor liability stated in dictum, however, that in certain situations it may be appropriate to hold successors liable for the breach of a duty to warn users of defects in the predecessor's products.⁴³

THE POLICY BASIS OF THE TRADITIONAL RULE OF SUCCESSOR NONLIABILITY

None of the cases discussed above contains a thorough discussion of the policy basis for the traditional rule of successor nonliability. Cases that expand successor liability focus on the plight of the plaintiff and rely upon strict liability policies supporting successor liability,⁴⁴ dismissing the traditional rule as not relevant to products liability claims.⁴⁵ Cases that do not expand successor liability factually distinguish cases relied on by plaintiffs and rebut strict liability policy arguments for successor liability, ignoring policies that support the traditional rule.⁴⁶ Some commentators, however, have focused on certain policies behind the traditional rule, arriving at different conclusions concerning the significance of these policies in assessing successor products liability.⁴⁷

⁴¹ *Domine*, 76 Ill. App. 3d at 258, 345 N.E.2d at 23.

⁴² *Id.*

⁴³ *Leannais*, 565 F.2d at 441-43; *Travis*, 565 F.2d at 448-49.

⁴⁴ See, e.g., *Ramirez*, 86 N.J. at 342, 431 A.2d at 816 (the traditional rule is "inconsistent with the developing principles of strict products liability and unresponsive to the interests of persons injured by defective products"); *Turner*, 397 Mich. at 419, 244 N.W.2d at 878 (emphasizing that the plaintiff's problem is the same regardless of the form of the corporate acquisition).

⁴⁵ In *Turner*, 397 Mich. at 416, 244 N.W.2d at 877, the Supreme Court of Michigan, referring to the traditional rule, stated that "products liability law . . . has to shake off various impediments associated with traditional concepts, which, while relevant to other problems, are inappropriate for this new area."

⁴⁶ See *Woody*, 463 F. Supp. at 820; *Leannais*, 565 F.2d at 439-40 and nn.5 & 6. Although this is the primary focus in these cases, each of them briefly mentions one reason for supporting the traditional rule. 463 F. Supp. at 821 (successor liability burdens business transfers); 565 F.2d at 439 (justice and fairness require that there be no liability for the totally independent acts of others). But see *Nguyen*, 104 Ill. App. 3d at 1147, 433 N.E.2d at 1109 ("[W]e find it difficult to understand how corporate law can be ignored in making the decision").

⁴⁷ See Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L. Rev. 86 (1975) (concluding that the traditional rule policies are sufficiently applicable to products liability claims that the de facto merger exception should not be expanded, and that any expansion of successor liability should be through a broadened continuation exception or through

Creditor Protection

One rationale supporting the traditional rule of nonliability is the protection of business creditors, which can be accomplished without successor liability. So long as the predecessor corporation is given adequate consideration for the assets, creditors' interests are sufficiently protected.⁴⁸ This rationale, however, does not support the application of the traditional rule to products liability claims which often arise long after the dissolution of the predecessor. Consequently, a products liability plaintiff is much less likely than a business creditor to benefit from the consideration paid to the predecessor.⁴⁹ Also, a business creditor willingly accepts the risk of default and can protect himself against it by negotiating for security, personal guarantees, and a higher interest rate. In contrast, the products liability plaintiff is not likely to have considered the possibility of injury, let alone bargained for protection against the manufacturer's dissolution.⁵⁰

Contract and Tort Principles

Contract law provides the basis for another rationale supporting successor's nonliability. Where the plaintiff's claim is contractual, the traditional rule is supported by the general principle that no one should be bound

a duty to warn theory); Note, *Cyr v. B. Offen & Co.: Liability of Business Transferees for Product Injuries*, 27 ME. L. REV. 305, 308-11 (1975) (policies behind traditional rule are inappropriate in products liability cases); Note, *Successor Corporations' Products Liability*, 27 HASTINGS L.J. 1305, 1328-29 (1976) (traditional policy of encouraging marketability of business assets is relevant in products liability cases, but is outweighed by strict liability policy).

⁴⁸ Even if creditors can only partially satisfy their claims out of the consideration, they are not unfairly prejudiced by being denied an action against the successor, because the risk that the predecessor would default due to business failure or other events was voluntarily assumed by the creditor. The traditional rule merely prevents the creditor from gaining a windfall from the fact that the debtor business sold its assets to a solvent corporation. See Note, *Cyr v. B. Offen & Co.: Liability of Business Transferees for Product Injuries*, 27 ME. L. REV. 305, 308-09 (1975). This creditor protection rationale is reflected in the fraud, de facto merger, and mere continuation exceptions to the traditional rule; because there is a need for creditor protection in these situations there is successor liability. See Note, *Products Liability: Developments in the Rule of Successor Liability for Product-Related Injuries*, 12 U. MICH. J.L. REF. 338, 351 n.168; Note, *Post Dissolution Product Claims and the Emerging Rule of Successor Liability*, 64 VA. L. REV. 861, 869 (1978).

⁴⁹ Although all states have some statutory provision for post-dissolution lawsuits, these often have little value to products liability claimants because they only allow such suits during a limited time period. See, e.g., DEL. CODE ANN. tit. 8, § 277 (1975). Once the predecessor has dissolved and distributed the consideration to its creditors and shareholders, pursuing the consideration into the hands of the shareholders is not likely to be an effective remedy for the products liability plaintiff. For a thorough analysis of the difficulties involved in products liability suits against dissolved corporations, see Wallach, *Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets & Subsequent Dissolution on Product Dissatisfaction Claims*, 41 MO. L. REV. 321 (1976); Henn and Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 CORNELL L. REV. 865 (1971).

⁵⁰ See Note, *Cyr v. B. Offen & Co.: Liability of Business Transferees for Product Injuries*, 27 ME. L. REV. 305, 309-10 (1975).

by an agreement to which he is not a party.⁵¹ Applying this rationale to products liability claims against successors, the traditional rule is limited, however, by the representation rationale of strict liability, which may justify successor liability in some situations.⁵²

Where the plaintiff's claim against the predecessor is based on tort law, a successor's nonliability is supported by the fact that he was not at fault.⁵³ Although strict liability claims are not based on the manufacturer's fault, they are based on his responsibility for the harm caused by his product. Consequently, the tort law rationale supporting the traditional rule nevertheless applies to strict liability claims against a successor for the products of its predecessor, because the successor was not responsible for the harm caused by the predecessor's product.⁵⁴

The Bona Fide Purchaser Doctrine

A final argument for the traditional rule is that successor nonliability promotes the free alienability and transferability of corporate assets. Several commentators⁵⁵ have stated that the traditional rule is analogous to the bona fide purchaser doctrine in real property⁵⁶ and commercial law,⁵⁷ which protects good faith purchasers from certain claims and liabilities arising prior to the transactions. Arguably, the bona fide purchaser doctrine encourages desirable commercial transactions by reducing the risk of loss

⁵¹ See, e.g., *id.* at 305, 318 n.58.

⁵² Contract principles are relevant to the representation rationale for strict liability because this rationale is related to the implied warranty branch of strict liability, which is "a curious hybrid . . . of tort and contract." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 95, at 634 (4th ed. 1971). The representation rationale is discussed *infra* notes 100-07, 119-21 and accompanying text.

⁵³ Note, *Cyr v. B. Offen & Co.: Liability of Business Transferees for Product Injuries*, 27 ME. L. REV. 305, 309 (1975).

⁵⁴ This justification for applying the traditional rule to strict liability actions is based on the premise that strict liability has retained the tort law causation requirement. See *infra* notes 92-99 and accompanying text. The tort law rationale for the traditional rule applies to strict liability claims if this rationale is understood to be based on the lack of a causal connection between the successor and the plaintiff's injury, rather than simply on the fact that the successor was not at fault in that he was not negligent.

⁵⁵ E.g., Note, *Ray v. Alad Corp.: Imposing Liability on the Successor Corp. for the Defective Products of the Predecessor Corp.*, 15 CAL. W.L. REV. 338, 356 (1979); Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L. REV. 86, 93 (1975).

⁵⁶ See 77 AM. JUR. 2d *Vendor and Purchaser* §§ 633-725 (1975); J. CRIBBETT, *PRINCIPLES OF THE LAW OF PROPERTY* 179 (1962), for the applications of the bona fide purchaser doctrine to real property transactions.

⁵⁷ See Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U.L. REV. 811, 813-16 (1979); Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954), for applications of the bona fide purchaser doctrine to commercial transactions. The Uniform Commercial Code contains many rules based on this doctrine. E.g., U.C.C. §§ 8-205, 8-206, 8-311 (1978) on the rights of a good faith purchaser of a security; and U.C.C. §§ 9-307(1), (2) (1978) on the priority of a buyer in ordinary course over a secured party.

to purchasers and allowing them to rely on the apparent good title of the vendor.⁵⁸

Although differences exist between a bona fide purchaser situation and the successor products liability problem,⁵⁹ the traditional rule of successor nonliability, like the bona fide purchaser doctrine, encourages desirable commercial transactions by reducing the buyer's risk of loss.⁶⁰ This reduces the buyer's uncertainty concerning the value of the property being purchased, making him more willing to enter into the transaction. Corporate acquisitions are desirable transactions because they benefit society by increasing economic efficiency and productivity.⁶¹

Assigning products liability to successors discourages corporate acquisitions because it increases the successor's risk of unanticipated liabilities, decreasing certainty concerning the value of the predecessor's assets.⁶² In-

⁵⁸ See Gilmore, *supra* note 57, at 1057 (the bona fide purchaser is protected so that "commercial transactions may be engaged in without elaborate investigation of property rights and in reliance on the possession of property by one who offers it for sale or to secure a loan").

A second justification for the bona fide purchaser doctrine is that of two innocent parties with conflicting claims to the property, the loss should fall upon the original owner, who could have taken greater precautions to protect his interest. See CRIBBETT, *supra* note 56, at 814.

⁵⁹ One way in which the typical bona fide purchaser situation differs from the successor products liability situation is that the latter is more likely than the former to involve claims arising after the transaction. For this reason the products liability claimant could not have protected his claim prior to the transaction; it was nonexistent at that time. This distinction means that the second justification for the bona fide purchaser doctrine, *supra* note 58, is not applicable to the successor products liability situation.

⁶⁰ Courts on both sides of the successor products liability issue have recognized this policy. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 25, 560 P.2d 3, 5, 136 Cal. Rptr. 574, 576 (1977) (the traditional rule "has the undoubted advantage of promoting the free availability and transferability of capital"); *Woody v. Combustion Eng'g, Inc.*, 463 F. Supp. 817, 821 (E.D. Tenn. 1978) (successor liability "greatly burdens business transfers and turns ordinary business transactions into traps for unwary successor corporations").

⁶¹ Most corporate acquisitions are mutually beneficial to the businesses involved, improving their productivity and profitability, enabling them to meet the demand for their products better. For example, one reason for selling a business is the need for more working capital, which another corporation may be able to provide. The buyer may have the capital but need the technological expertise of the seller. See S. Kinney, *Why Companies are for Sale*, in *CORPORATE GROWTH THROUGH MERGER & ACQUISITION* 43 (1963). Other reasons for buying or selling a business include sharing costs of new technology or specialized staff that would otherwise be unaffordable, and improving or expanding product distribution. See Dettmer, *Reasons for Mergers and Acquisitions*, in *CORPORATE GROWTH THROUGH MERGER & ACQUISITION* 30-35 (1963).

⁶² There are two distinct sources of uncertainty. First, there is the uncertainty that exists because the law is in a period of rapid change, making it difficult to predict what the liability rule will be in the future in any given jurisdiction. This source of uncertainty has been noted by several commentators. See Hoffman, *Products Liability for Successor Corporations: A Break from Tradition*, 49 U. COLO. L. REV. 357, 369-70; Note, *Products Liability—Corporations—Asset Sales & Successor Liability*, 44 TENN. L. REV. 905, 916 (1977). This uncertainty is a problem, but, as the First Circuit pointed out in *Cyr. v. B. Offen & Co.*, 501 F.2d 1145, 1154 (1st Cir. 1974), "this kind of surprise is endemic in a system where legal principles are applied case by case." This source of uncertainty is temporary and therefore does not influence the desirability of the various alternative liability rules as such. Second, there is

insurance, however, is a means of spreading risks, substituting a known premium for an unknown probability of loss. The uncertainty faced by a prospective purchaser of corporate assets under a successor liability rule would be minimal if the purchaser could purchase, for a reasonable price, insurance covering liability for the predecessor's products into the distant future. The successor would then be able to bargain down the price of the assets to cover the cost of the insurance. The successor liability rule's effect of discouraging transactions would be minimized.⁶³ Unfortunately, the practical realities of the products liability insurance market make this solution unrealistic.⁶⁴ Consequently, insurance does not adequately perform its function of reducing uncertainty. Instead of encountering an unknown risk of liability, the successor corporation is faced with an unknown risk of large premium increases or the complete unavailability of insurance. Under these circumstances, a rule of successor liability can be expected to discourage socially desirable corporate asset acquisitions.⁶⁵ This business reality con-

the uncertainty that is inherent in a successor products liability rule; the risk of unpredictable liabilities. This type of uncertainty does influence the desirability of various successor liability rules, because it varies depending on the rule adopted.

⁶³ This solution has been mentioned repeatedly, by both courts and commentators. See, e.g., *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 802 (W.D. Mich. 1974) ("acquiring corporation will merely arrange for the continuation of the products liability insurance maintained by the seller"); Note, *Successor Corporations' Products Liability*, 27 HASTINGS L.J. 1305, 1329 (1976) ("insurance eliminates any objection to the proposed rule on the grounds of unpredictability . . . because the only added cost would be increased premiums commensurate with the augmented exposure of the carrier").

⁶⁴ As the court in *Ray v. Alad Corp.* recognized, most products liability insurance policies are on an "occurrence basis," covering only injuries that occur during the policy period, rather than those caused by products manufactured during the policy period, whenever they might occur. 19 Cal. 3d at 32, 560 P.2d at 9, 136 Cal. Rptr. at 580 (1977); See 3A L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 50.02 (1981). Therefore, the liability for injuries from the predecessor's products occurring after the acquisition is usually not covered by the predecessor's insurance. Furthermore the policy period is likely to be quite short, as insurers "are reluctant to write long-term products liability policies." Note, *Corporations: Products Liability Under the De Facto Merger Doctrine—Knapp v. N. American Rockwell*, 49 TEMP. L.Q. 1014, 1023 (1976). For heavy equipment, such as that involved in most of the successor liability litigation, the typical policy is for a maximum of two years. *Id.* At the end of this period the policy will be reevaluated, and the premium may be increased or the policy may simply be dropped. *Id.*

Another problem with products liability insurance is that some businesses are simply unable to buy insurance, at any price. One survey found that 21.6% of the businesses seeking products liability insurance could not obtain it. *Products Liability Insurance: Hearings Before the Subcommittee on Capital Investment and Business Opportunities, of the House Comm. on Small Businesses*, 95th Cong., 1st Sess. 4 (1977). If the recent past is any indication, premiums for products liability insurance can be expected to increase significantly for all policyholders. "The average increase in [products liability] premium costs from 1970 to mid-1977 was 944.6%." Note, *Products Liability and Successor Corporations, Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance*, 13 U.C.D. L. REV. 1000, 1025 n.93 (1980). Those unfortunate enough to develop major liabilities can expect that at the end of the policy term, the unavailability and unaffordability problems faced by all policy holders will be magnified for them as the insurance company adjusts to the increased risk.

⁶⁵ But see *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 428, 244 N.W.2d 873, 882 (1976), arguing that since mergers involve successor liability, yet continue to occur, there is no reason

trasts sharply with the prevalent judicial assumptions concerning the ability of manufacturers to insure against products liability.⁶⁶ Therefore, the bona fide purchaser rationale of the traditional rule supports the application of the traditional rule to the successor products liability problem.

Alternative Solutions Consistent with the Policies of the Traditional Rule

Commentators have promulgated solutions to the successor liability issue that are consistent with rationales underlying the traditional rule of nonliability. One solution takes a legislative approach that expands successor liability and takes measures designed to improve the insurance situation.⁶⁷ The second solution is judicial extension of the bona fide purchaser analogy.⁶⁸ Under this approach the successor would not be liable if it acquired the predecessor's assets in good faith without notice of the existence or likelihood of the type of product defect in question. This would be an objective standard of notice based on what would be revealed by a reasonable investigation of the predecessor's liability record, quality control, design safety, and any other available data that might indicate a likelihood of future claims arising out of a particular type of defect. The successor would be liable for claims based on defects in the predecessor's products only if it had notice or should have had notice that such defects were likely. If, after reasonable investigation, the successor did not find any likely defects, it would then be able to enter into the transaction with the certainty that it would be free of liability for the predecessor's products.

This latter solution would provide a better balance between the societal interest in compensating products liability plaintiffs and society's interest in encouraging desirable corporate acquisitions. It would prevent corporations from using acquisitions to avoid predictable liabilities at the expense of innocent accident victims. It would also reduce the uncertainty of successors concerning their potential liabilities for the products of predecessors which exists under the other rules expanding successor liability. In this way, it would discourage those transactions which are most likely to leave

to think successor liability will discourage asset acquisitions. The response to this argument is that because the traditional nonliability rule applies, transactions occur as asset acquisitions that would not occur as mergers because of the uncertainty associated with liability. These will not occur at all if there is successor liability for asset acquisitions.

⁶⁶ See, e.g., *Cyr*, 501 F.2d at 1154 ("hazards of . . . insuring for risk from defective products are better borne by the manufacturer than by the consumer"). See also *Shannon*, 379 F. Supp. at 802.

⁶⁷ See Note, *Products Liability: Developments in the Rule of Successor Liability for Product-Related Injuries*, 12 U. MICH. J.L. REF. 338, 393-94 (1979), for a discussion of the advantages of a legislative solution over a judicial solution. See also Note, *Products Liability and Successor Corporations: Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance*, 13 U.C.D. L. REV. 1000, 1025-32 (1980), for suggested legislative reforms of tort and insurance law which would improve the products liability insurance situation.

⁶⁸ See *supra* notes 55-60 and accompanying text.

behind many uncompensated victims of the predecessor's products, while creating a more favorable legal environment for the majority of these transactions which are desirable. Finally, this second solution would be consistent with the tort law rationale of the traditional rule⁶⁹ because liability would be tied to the successor's own actions for which it is actually responsible (its investigation of the likelihood of future claims), rather than based entirely on the independent actions of the predecessor (manufacturing defective products).

Policies supporting the traditional rule of nonliability suggest that these different resolutions of the problem are preferable to judicial expansion of successor liability under the *Turner* or *Alad* rules.⁷⁰ Corporations may not be able to adjust to such expanded liability by simply buying insurance and bargaining down the purchase price of the assets. Successor liability rules may have a negative economic impact. This potential harm must be kept in mind and balanced with strict liability policies that supposedly support expanded successor liability. If these policies strongly support a particular rule of successor liability, then the benefits of such a rule in terms of the goals of strict liability may well outweigh its potential negative economic impact, thus justifying the rule.

STRICT PRODUCTS LIABILITY POLICIES AND SUCCESSOR PRODUCTS LIABILITY

The Policy Rationales

There is no comprehensive theory of strict products liability that provides simple and automatic answers to problems involving proposed extensions of the doctrine to new situations. Rather, there are a number of different policy rationales that may be used to justify strict liability. In *Cyr v. B. Offen & Co.*,⁷¹ the First Circuit listed these rationales: the manufacturer is better able to protect itself and bear the costs while the consumer is helpless; it is the manufacturer that has launched the product into the channels of trade; it is the manufacturer that has violated the representation of safety implicit in putting the product into the stream of commerce; and the manufacturer is the instrumentality to look to for improvement of the product's quality.⁷²

The first rationale was also referred to by the Supreme Court of California in *Ray v. Alad Corp.*⁷³ The court in *Alad* stated that manufacturers can insure against the costs of product-related injuries and spread the cost of

⁶⁹ See *supra* notes 53-54 and accompanying text.

⁷⁰ See *supra* notes 16-27 and accompanying text.

⁷¹ 501 F.2d 1145 (1st Cir. 1974).

⁷² *Id.* at 1154.

⁷³ 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

insurance to the consuming public as part of the price of their products.⁷⁴ This rationale will be referred to as "cost spreading." The second rationale emphasizes the manufacturer's active role in causing the injury⁷⁵ and will be referred to as "causation" because it is analogous to the tort law requirement of cause-in-fact. The third rationale protects consumer expectations based on an implied representation of product quality, and will therefore be referred to as "representation." The fourth rationale involves the use of strict liability as a financial incentive for product safety improvement. It does this by deterring the production of unsafe products, and will therefore be referred to as "deterrence."⁷⁶

Applying the four rationales to the successor liability problem in *Cyr*, the First Circuit reasoned that the successor corporation was liable because it was in a better position to insure against the risk of defects and to improve the quality of the product.⁷⁷ The court conceded, however, that the successor neither launched the defective product into the stream of commerce nor made an implied representation of product quality.⁷⁸ Thus, although successor liability was not supported by the causation or representation rationales, it was supported by the cost spreading and deterrence rationales. Such support was sufficient for the court in *Cyr* to conclude that successor liability was appropriate.⁷⁹

⁷⁴ *Id.* at ___, 560 P.2d at 8, 136 Cal. Rptr. at ___. This is essentially the same idea as the first rationale from *Cyr v. B. Offen Co.* The manufacturer can protect itself through insurance and can bear the costs because it can pass them on to consumers.

⁷⁵ Regardless of whether the manufacturer was negligent, it was responsible for causing the injury. If the manufacturer had not put the defective product into the stream of commerce, the plaintiff would not have been injured.

⁷⁶ Sometimes the deterrence rationale is expressed as a policy that the costs of product injuries should be treated "as a cost of . . . doing business, thus assuring that . . . enterprises will fully 'pay their way'" in society. Owen, *Rethinking the Policies of Strict Products Liability*, 36 VAND. L. REV. 681, 685 (1980). As will be discussed *infra* notes 86-88 and accompanying text, requiring enterprises to "pay their way" serves the purpose of encouraging all economically efficient safety improvements. Thus, this policy is functionally equivalent to the deterrence rationale in that it also furthers the deterrence goal of improving product safety.

⁷⁷ *Cyr*, 501 F.2d at 1154.

⁷⁸ *Id.*

⁷⁹ *Id.* The court in *Cyr* also felt that successor liability was supported by the fact that the successor was "profiting from . . . the accumulated good will which the products have earned, both in its outward representations of continuity and in its internal adherence to the same line of equipment." *Id.* This statement suggests two distinct rationales for successor liability. The first is that liability for the predecessor's products somehow is justified by the fact that the successor benefits economically from the predecessor's reputation. A similar idea is found in the statement in *Ray v. Alad Corp.* that successor liability "causes the one 'who takes the benefit [to] bear the burden.'" 19 Cal. 3d at ___, 560 P.2d at 11, 136 Cal. Rptr. at ___, (quoting CAL. CIV. CODE § 3521 (West 1970)). This note does not treat this idea as a distinct strict liability policy rationale both because it is not used to justify strict liability other than in the successor liability area and because it is a very weak argument for successor liability. Although it is certainly true that a successor may benefit economically from its predecessor's reputation, the cost of this benefit was included in the acquisition price. See *Tift v. Forage King Indus.*, 108 Wis. 2d 72, 98, 322 N.W.2d 14, 26 (1982) (Callow, J., dissenting). It is not as if the successor is getting something for nothing if it is not held liable for the predecessor's products. Furthermore, in addition to the financial burden in the form

The policy analysis in *Cyr* illustrates the basic problem involved in applying strict liability policy to the successor liability issue: whether strict liability is appropriate when one or more of the four rationales do not support liability. In the early stages of development of strict products liability this was not a problem because all four rationales supported liability in the cases that gave rise to the doctrine.⁸⁰ In successor liability, as in some other situations in which expansion of the scope of strict liability has recently been controverted,⁸¹ one or more of the rationales do not support liability. Determining whether strict liability should apply in such situations requires an inquiry into which combinations of rationales should be sufficient to justify the imposition of strict liability. Unfortunately, courts that expand successor liability, like the court in *Cyr*, have failed to face squarely this fundamental problem of strict liability policy. These courts have tended to emphasize the rationales which support liability, while remaining silent on the importance of those rationales which do not support liability.⁸² Several of the courts refusing to expand successor liability, however, have emphasized the rationales that do not support liability.⁸³

Evaluating the desirability of the various possible solutions to the successor liability issue in terms of strict liability policy requires that each of the four strict liability rationales be examined more closely. For each rationale, three questions must be considered. The first question concerns the role that the rationale presently plays in strict liability doctrine. The second question concerns the importance that should be attached to the

of the purchase price, another burden which necessarily goes with the benefit from the predecessor's goodwill is the potential that this goodwill may be destroyed if the predecessor's products prove to be defective and this erodes their reputation. Thus, liability for the predecessor's products is not a necessary corollary of the proposition that some burden must be attached to the successor's benefit from the predecessor's goodwill.

The second rationale for successor liability suggested by the above statement from *Cyr* is that liability for the predecessor's products is justified by the successor's representation to the public that it is the same business or produces the same product as the predecessor. This idea is treated in this note as a variation of the representation rationale, and is discussed *infra* notes 148-55 and accompanying text.

⁸⁰ *E.g.*, *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). In *Greenman*, the defendant manufacturer was not only able to spread the cost of the injuries and improve the product quality, but was also the party which launched the product into the stream of commerce, thereby impliedly representing the product's safety.

⁸¹ For a discussion of some of these other situations, see Owen, *supra* note 76, at 703; Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1081-92 (1980).

⁸² *E.g.*, *Alad*, 19 Cal. 3d at 22, 560 P.2d at 3, 136 Cal. Rptr. at 574 (emphasizing cost spreading but not mentioning causation, deterrence, or representation).

⁸³ *E.g.*, *Domine v. Fulton Iron Works*, 76 Ill. App. 3d 253, 257, 395 N.E.2d 19, 23 (1979):

The cornerstone of strict liability rests upon the defendant's active participation in placing the allegedly defective product into commerce. . . .

The corporate successor . . . cannot be said to have created the risk . . . , has neither invited use of the product nor represented to the public that the product is safe . . . [and] is not in a position to exert any pressure upon the manufacturer to enhance the safety of the product.

rationale in the future development of strict liability doctrine. The third question concerns the extent to which the rationale supports the various alternative solutions to the successor products liability issue.

The Present Roles of the Policy Rationales

Under the doctrine of strict liability, cost spreading is neither a necessary nor a sufficient basis for the imposition of liability. It is not necessary because strict liability doctrine allows an injured consumer to recover from a manufacturer or merchant as a matter of law, regardless of whether the manufacturer or merchant is actually in a better position than the injured consumer to spread the cost of the injury by insuring against the risk of product-related injury.⁸⁴ It is not sufficient because there are situations in which the manufacturer is not responsible despite his superior cost-spreading ability.⁸⁵

Deterrence

The goal of the deterrence rationale in tort law has been defined as minimizing "the sum of the cost of accidents and the costs of avoiding accidents."⁸⁶ Achievement of this goal requires the implementation of all safety measures which are cost effective, that is, which reduce the costs of accidents by more than they increase the costs of avoiding accidents.⁸⁷ Tort law furthers this goal of deterrence when it places liability for accident costs on the party that is able to implement safety measures most cost effectively.⁸⁸

⁸⁴ Although the manufacturer's superior cost-spreading ability may seem self-evident, this proposition deserves closer scrutiny. In general, products liability insurance is expensive and can be difficult to obtain, *see supra* note 66 and accompanying text. Some manufacturers are small corporations or sole proprietorships with little capacity for risk absorption. Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L. REV. 86, 90 (1975). In contrast, many victims of product-related accidents have some capacity for loss spreading through such means as medical insurance, Medicare, or workmen's compensation. Owen, *supra* note 76, at 706.

⁸⁵ For example, the manufacturer is not liable if there is no proof that the product was defective, if an adequate warning was provided, or if the plaintiff assumed a known risk. RESTATEMENT (SECOND) OF TORTS § 402A comments g, j, & n (1965). In each of these situations, although the manufacturer placed the product into the stream of commerce, its causal role is remote and insignificant in comparison with other parties, such as the party who failed to heed the warning or the party who knew of the risk and voluntarily assumed it. The deterrence rationale supports liability of other parties: those who played more immediate causal roles in the accident and hence are in a better position to prevent such accidents. If there is no defect, then the implied representation of product quality could not have been violated; the representation is only that the product is not defective, not that it will never cause an injury. If there is a warning, then the manufacturer's representation was only that the product was safe if the warning was heeded.

⁸⁶ G. CALABRESI, *THE COSTS OF ACCIDENTS* 26 (1970).

⁸⁷ *See id.* at 73-75.

⁸⁸ *See id.* at 135.

Under present strict liability doctrine, the support of the deterrence rationale is necessary to the imposition of liability. When an injury is caused by a product defect that existed when the product left the manufacturer's control, the manufacturer who is held strictly liable is able to prevent such injuries in the future by improving the product.⁸⁹ The manufacturer is not liable, however, when an injury involving a product is caused not by such a defect, but by some other factor such as mishandling of the product after it left the manufacturer's control, unforeseeable misuse of the product by the plaintiff,⁹⁰ or failure of the plaintiff to heed a warning concerning the product.⁹¹ In these situations, liability of the manufacturer is not supported by the deterrence rationale because other parties, such as the distributors or consumers of the product, are able to implement safety measures more cost effectively. Thus, under present strict liability doctrine, manufacturers are not held liable for product-related injuries when the deterrence rationale does not support liability.

Causation

The causation requirement is essentially the tort law requirement of cause-in-fact. Although the transition from negligence to strict liability involved major changes in traditional tort law doctrine, this basic causation requirement was retained.⁹² Whether phrased in terms of "causation" or in terms of "responsibility," some causal connection linking the defendant, the specific product that caused the injury, and the plaintiff is required. The defendant must be responsible for the plaintiff's injury because it placed the product which caused the injury in the stream of commerce. If a manufacturer's product caused the plaintiff's injury, then the manufacturer's conduct in producing and selling the product was a causal factor in the injury, even if other factors were more significant and immediate causes.⁹³ Current strict liability doctrine requires a greater degree of causation than this in order to hold a manufacturer liable. The injury must have been caused by the product's defect, and the product must have been defective at the time it left the defendant's control.⁹⁴

Although current strict products liability doctrine sometimes places liability on a party whose causal role was rather minor or remote, it never

⁸⁹ See L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4][e][ii] (1982).

⁹⁰ See *id.* § 16A[4][d].

⁹¹ 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:39, at 751 (2d ed. 1974).

⁹² See Fegan, *Successor Corporations & Strict Liability in Tort—A Convergence of Two Opposing Doctrines*, 69 ILL. B.J. 142, 153 (1980) ("strict liability has never meant liability without responsibility for the defect, but rather was intended to remove the barriers to recovery between the injured person and the manufacturer of the defective product").

⁹³ For example, the defect may have been caused by tampering subsequent to the sale or the plaintiff may have ignored a warning.

⁹⁴ PROSSER, *supra* note 52, at 671-72; RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

places liability on a party who was not a cause-in-fact of the injury at all.⁹⁵ This is illustrated by the application of strict liability to wholesalers and retailers of defective products.⁹⁶ Often the causal role of a wholesaler or retailer who is held strictly liable is relatively minor and remote compared to that of the manufacturer, but it does exist.⁹⁷ The plaintiff still must prove that his injury was caused by a product defect which existed at the time the defendant sold the product,⁹⁸ and that the defendant sold the particular product which caused his injury.⁹⁹ Thus, under present strict liability doctrine, liability is always supported by the causation rationale.

Representation

Under the representation rationale, liability for a product-related injury is justified when the product fails to conform to the seller's representation

⁹⁵ This causation requirement recently has been challenged in several cases involving so-called industry-wide or enterprise liability. *E.g.*, *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980). In these cases manufacturers were held liable despite the inability of the plaintiffs to prove that the defendants had manufactured the particular products that had caused their injuries. The plaintiffs were only able to prove that the defendants had manufactured defective products identical to those which had injured them. Industry-wide or enterprise liability in such situations is not supported by the causation rationale because there is no proof of any causal connection between the defendant's conduct and the plaintiff's injury. Arguably, the result in *Bichler* was supported by a form of causation in that the court justified liability with a concerted action theory. Under this theory, the defendants, along with all other manufacturers of identical products, had acted together to some extent in developing the product, so that their joint action caused the plaintiff's injuries by causing the marketing of the defectively designed product by a large number of manufacturers. *See* 55 N.Y.2d at 581-86, 436 N.E.2d at 186-89, 540 N.Y.S.2d at 780-83.

Industry-wide or enterprise liability is not generally accepted as part of strict liability doctrine and has been criticized for extending the scope of strict liability beyond the usual causation requirement, *see, e.g.*, *Sindell*, 26 Cal. 3d at 614-15, 607 P.2d at 938-39, 163 Cal. Rptr. at 146-47 (Richardson, J., dissenting), and beyond the fact of participation in the chain of manufacture and distribution of the particular product which caused the injury, *see, e.g.*, Note, *Industry-Wide Liability*, 13 SUFFOLK U.L. REV. 980, 1001 (1979).

⁹⁶ *See* RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965); Annot., 13 A.L.R.3d 1057 § 10[c], [d] (1967).

⁹⁷ These parties can be held liable for the sale of a defective product, even though the defect existed at the time they received the product, in which case the original cause of the defect was some other party. In such a situation the wholesaler or retailer is not a cause-in-fact of the defect, but is a cause-in-fact of the plaintiff's injury in two respects. First, but for its sale of the product the injury would not have occurred. This aspect of retailer-wholesaler causation of harm was recognized in the statement in *Mead v. Warner Pruyn Div., Finch Pruyn Sales*, 87 Misc. 2d 782, 795, 386 N.Y.S.2d 342, 344 (1976) that the sale by the retailer "was the final link in the chain which placed the defective product in position to inflict harm." Second, but for the retailer's failure to discover the defect and remove the product from the stream of commerce, the injury would not have occurred. This aspect of retailer-wholesaler causation of harm is suggested by the statement in *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1969) that "the retailer himself may play a substantial part in insuring that the product is safe."

⁹⁸ *See* RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965).

⁹⁹ 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1:41 (2d ed. 1974).

of the product and to the expectations this representation creates in the mind of a reasonable consumer.¹⁰⁰ In many strict liability situations, the representation rationale coincides with the other rationales in supporting liability.¹⁰¹

In two situations, however, the representation rationale may support a result different from that supported by the other rationales. First, representation of a product and the expectations of a reasonable consumer are important in determining whether a product is defective.¹⁰² Some courts have held that strict liability was not appropriate because the alleged defect was so obvious or so inherent in the nature of the product that the product still conformed to the manufacturer's representation or the expectations of a reasonable consumer.¹⁰³ In these situations, the cost spreading, deterrence, and causation rationales support liability. Second, the representation rationale is important in the strict liability of a trademark licensor. Several cases have held that a trademark licensor is liable for injuries caused by products manufactured by another party and sold under the trademark name.¹⁰⁴ In these cases representation was of the manufacturer's identity¹⁰⁵

¹⁰⁰ See Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function & Legal Liability for Product Disappointment*, 60 VA. L. REV. 1113, 1370 (1974); Bernacchi, *A Behavioral Model for Imposing Strict Liability in Tort: The Importance of Analyzing Product Performance in Relation to Consumer Expectation and Frustration*, 47 CIN. L. REV. 43, 46-47 (1978). The representation may be through advertising, the product's appearance, or general public opinion concerning the product's function. Shapo, *supra*, at 1370.

¹⁰¹ For example, when a product causes injury while being used in the manner for which it was intended, the representation rationale supports liability of the manufacturer because it expressly or impliedly represented that the product was fit for such use. Liability of the manufacturer is further supported by the cost spreading rationale because the manufacturer is likely to be a better cost spreader than the consumer; the deterrence rationale supports such liability because the manufacturer is in the best position to make cost-effective safety improvements; and liability is supported by the causation rationale because the manufacturer played a significant role in causing the injury when it placed the defective product in the stream of commerce.

¹⁰² See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965) (product is defective when it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him").

¹⁰³ See, e.g., *Hartman v. Miller Hydro Co.*, 499 F.2d 191 (10th Cir. 1974) (danger of industrial machine was obvious; not "beyond contemplation of an ordinary user"); *Bemis Co. v. Rubush*, ___ Ind. App. ___, 427 N.E.2d 1058 (1981) (danger of industrial machine was obvious; manufacturer not liable for failure to warn of "open and obvious danger"); *Atkins v. Arlans Dept. Store*, 522 P.2d 1020 (Okla. 1974) (danger of lawn dart game did not exceed that "contemplated by the ordinary consumer"); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975) (lack of self-latching gate on swimming pool is not a defect under Wisconsin test based on "the reasonable expectations of the ordinary consumer").

¹⁰⁴ E.g., *Carter v. Joseph Bancroft and Sons, Co.*, 360 F. Supp. 1103 (E.D. Pa. 1973); *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979). In these cases liability was also supported by the deterrence rationale, as the licensor was in a position to pressure the manufacturer to improve product quality. The licensors in these cases were involved in prescribing specifications and quality standards. 360 F. Supp. at 1107; see 75 Ill. 2d at 410-11, 389 N.E.2d at 161.

¹⁰⁵ In many cases the intent of the licensor and licensee is to convey the thought that the licensor was the manufacturer. Even if this is not intended, a reasonable consumer would

as well as the safety of the product. Although the other rationales provided some support for licensor liability, the representation rationale provided stronger support.¹⁰⁶

The proper role of the representation rationale in strict liability doctrine is presently an unsettled issue. The fact that some courts did not impose liability in situations in which the product did not violate the manufacturer's representation or the consumer's expectation suggests that the support of the representation rationale is necessary to the imposition of strict liability. On the other hand, there are cases which suggest the opposite conclusion.¹⁰⁷

The Importance Which Should Be Attached to These Rationales in the Future Development of the Law of Strict Products Liability

The cost spreading rationale should never be a sufficient justification for expanding the scope of the doctrine of strict products liability to new situations, such as the successor corporation situation. If cost spreading is the only goal to be accomplished by holding a party liable in a given situation, this goal can be accomplished much more efficiently through a system of social insurance, in which injured parties would be compensated out of tax revenues.¹⁰⁸ Under such a system, there would be no reason to limit

be likely to perceive it. The "licensor in effect tells the public that it made the product." Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 703 (1980) (emphasis added). With this kind of involvement, it is clear that the licensor has influence over the product quality.

¹⁰⁶ The involvement of the licensor discussed *supra* note 104 indicates that licensor liability may have a deterrent effect, and that the licensor may have played a causal role in the plaintiff's injury. Nevertheless, depending on the nature of the defect, the licensee may be in a much better position to make safety improvements, and may have played a significant causal role. For example, with a defect caused by the negligence of a licensee employee, the deterrence and causation rationales provide stronger support for licensee liability than for licensor liability; with a defect attributable to the licensor's design, these rationales provide stronger support for licensor liability. A rule that allows licensor liability without regard to the nature of the defect is therefore heavily influenced by the representation rationale, which supports liability regardless of the nature of the defect.

¹⁰⁷ *E.g.*, *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276 (1978) (that defect is "open and obvious" does not prevent it from being "unreasonably dangerous"; the manufacturer may still be liable); *Stenberg v. Beatrice Foods Co.*, 176 Mont. 123, 576 P.2d 725 (1978) ("there are no policy reasons to refuse recovery if the condition is . . . open and obvious"). For a criticism of the cases denying liability because consumer expectations were not frustrated, see Tweriski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 305-16 (1977).

¹⁰⁸ Several commentators have recommended a form of social insurance as a solution to the successor liability problem. *E.g.*, Note, *Products Liability for Successor Corporations: A Break from Tradition*, 49 U. COLO. L. REV. 357, 375 (1978); Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L. REV. 86, 110 (1975). It has also been proposed as a backup system for products liability generally, compensating victims who "cannot collect an otherwise enforceable judgment," VII INTER-AGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEPT. OF COMMERCE, *PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY* 24-33 (1977), and discussed as a substitute for strict products liability generally, Schwartz, *Products Liability—No-Fault Insurance: Can One Live Without the Other?*, 12 FORUM 130 (1976-1977).

compensation to product-related accident victims; rather victims of all accidents and illnesses should be compensated, thereby spreading these costs throughout society.¹⁰⁹ Such a comprehensive system of cost spreading is probably not politically feasible in the United States today. Without sufficient public support for legislation that designates cost spreading as an end in itself, cost spreading should not serve as the sole support for judicial decisions that impose liability.

Another reason why cost spreading alone should not justify the expansion of strict liability to new situations is that there is an inherent conflict between the goals of cost spreading and deterrence.¹¹⁰ If cost spreading were maximized, there would be no direct financial deterrent to the production of unsafe products. Under a system of social insurance that maximizes cost spreading, the manufacturer's payment into the system would be totally independent of the accident costs imposed on society by his product. Because there would be no direct financial penalty to the manufacturer for the production of unsafe products,¹¹¹ cost spreading would be maximized at the expense of deterrence.

Existing strict liability doctrine strikes a balance between these two conflicting goals.¹¹² This balance should be maintained in the future develop-

¹⁰⁹ See G. CALABRESI, *THE COSTS OF ACCIDENTS* 43 (1975) (referring to cost spreading as "secondary cost avoidance"). The case for such a comprehensive social insurance program has recently been made in depth in E. BERNZWEIG, *BY ACCIDENT NOT DESIGN: THE CASE FOR COMPREHENSIVE INJURY REPARATIONS* (1980). Such an approach to cost spreading is not merely an academic possibility, but is a workable alternative to the tort system. New Zealand has had a successful comprehensive accident compensation system since 1974. See *id.* at 191-209. Under this system, "when accidental injury is sustained, compensation is payable regardless of how or where the accident may have happened or who may have been at fault." *Id.* at 191.

Social insurance would more efficiently accomplish cost spreading for several reasons. First, it would vastly simplify the factual and legal inquiry prior to compensation by eliminating the need to establish the liability of a particular defendant. The only factual and legal issues to be determined would be those concerning damages: whether the plaintiff was in fact injured in an accident, how serious his injuries were, and how much compensation he was entitled to. Second, all injured plaintiffs would be compensated and thereby have their accident costs spread, whereas under the tort system there are many fortuitous circumstances which can prevent injured plaintiffs from being compensated. That the corporation which manufactured the product that injured the plaintiff has sold its assets and dissolved is but one of such circumstances. Others include proof problems such as the inability to prove that a product defect existed when the product left the control of the manufacturer, recovery problems such as the inability of an uninsured defendant to pay a large judgment, and legal doctrines unrelated to the goal of cost spreading, such as contributory or comparative negligence. Third, social insurance would more efficiently accomplish cost spreading because it would ensure that the cost of all compensated injuries would be spread evenly throughout society, whereas under the tort system liability is placed on defendants with varying abilities to spread cost. See *supra* note 84 and accompanying text.

¹¹⁰ See G. CALABRESI, *THE COSTS OF ACCIDENTS* 94 (1975).

¹¹¹ See *id.* at 64-65. This does not mean there would be no incentives of any kind, as manufacturers would still want to avoid developing a reputation for producing unsafe products.

¹¹² See *supra* note 85 for some situations in which deterrence prevents the placing of liability on the manufacturer, who is usually the best cost spreader. A compromise in the other direction is that liability insurance is allowed. This is justified by cost spreading, but reduces the deterrent effect of liability by reducing its financial impact on the defendant. See ATIYAH, *ACCIDENTS, COMPENSATION & THE LAW* 604 (3d ed. 1980).

ment of strict liability doctrine, and cost spreading alone should never justify the expansion of strict liability to new situations, because "[a] system that compensates for accidents perfectly once they have occurred but does nothing to prevent them in the first place is obviously not desirable."¹¹³ Thus, the support of the deterrence rationale should continue to be necessary to the imposition of strict liability, and the support of the cost spreading rationale should never be a sufficient basis for the imposition of strict liability.

One function of the causation rationale is that it serves as a rough but usually reliable indicator as to who should be held liable for the purpose of deterrence.¹¹⁴ If successor liability is supported by the deterrence rationale, although not by the causation rationale, and if the only function of the causation rationale is this proxy relation to the deterrence rationale, then one might conclude that the causation rationale is a mere vestige of fault liability that should not be allowed to interfere with the real policies of strict liability. This argument for rejecting the causation rationale is bolstered by the fact that liability is usually shifted or spread so that the ultimate burden falls on noncausal parties.¹¹⁵ Since the shifting or spreading occurs indirectly even when liability is supported by the causation rationale, perhaps courts should no longer rely on the support of the causation rationale.

One argument for retaining the causation rationale, even when it does not further deterrence, is that liability of a party who played no causal role in the injury violates a moral and intuitive sense of justice and fairness.¹¹⁶ Although tort liability is not ordinarily thought to serve a retributive or

¹¹³ G. CALABRESI, *THE COST OF ACCIDENTS* 64 (1975). Arguably, the prevention of product-related accidents need not be achieved through strict liability, but could be achieved entirely through direct government regulation of product design and safety. Under such a system, strict liability justified solely by cost spreading would be acceptable, although social insurance would still be preferable as a means of cost spreading. The problem with this argument is that strict liability is preferable to direct regulation as a means of deterrence. Strict liability forces businesses to consider the social costs imposed by their products in making product design and production decisions, but the ultimate decisions remain in the private sector; with direct regulation the decisions are made by government agencies. Strict liability has the advantage of encouraging only cost-effective safety improvements, see *supra* notes 85-86 and accompanying text; with direct regulation a government agency not operating under the profit motive might be inclined to require inefficient safety improvements, which cost far more than the costs of injuries they save.

¹¹⁴ A party who played a causal role in an accident is usually in a position to respond to the incentive created by liability by taking some safety measure to reduce or eliminate his causal role. Causation is only a rough indicator for deterrence, however, for it provides no guidance in choosing from all the causally involved parties the party able to take safety measures most cost effectively. See *supra* text accompanying notes 86-88.

¹¹⁵ Through insurance and/or price increases, manufacturers spread the cost of liability to other insured manufacturers, and/or shift it to consumers.

¹¹⁶ See Case Note: *Corporation—Successor's Tort Liability for Acts or Omissions of Predecessor*—Cyr v. B. Offen & Co., 16 B.C. INDUS. & COM. L. REV. 676, 687 (1975); cf. *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977) (traditional rule is consistent "with the fundamental principle of justice and fairness, under which the law imposes responsibility for one's own act and not for the totally independent acts of others.").

punitive function, it can have that effect, especially when it involves huge liabilities that are not adequately covered by insurance. It thus seems unfair to impose liability on a party that does not even remotely "deserve" it, such as a party that played no causal role in the injury. When the liability is spread, and thereby indirectly placed on noncausal parties, this fairness concern is much weaker. Spreading liability is more like paying a tax than like paying a fine: everyone else has to do it also. On the other hand, liability placed directly on a noncausal party is more like a fine.

The causation rationale is consistent with basic notions of justice. Also, until recent cases concerning successor and industry-wide liability, causation was the one element of tort law that was retained in the transition to strict liability.¹¹⁷ Considering the significance of the change involved in eliminating the causation rationale, it is surprising how easily some courts have expanded successor liability without addressing this issue. Considerations of justice and fairness should be taken as seriously as the more utilitarian economic policy considerations.¹¹⁸ Support of the causation rationale should be retained as a necessary element of strict liability, and rules of successor and enterprise liability not consistent with it should be rejected.

The view represented by the cases that allow recovery without the support of the representation rationale¹¹⁹ is quite persuasive. If the violation of a representation or consumer expectation of a product is treated as a necessary condition for liability, the deterrence policy, as well as the cost spreading policy, is weakened because while no representation or expectation is violated when an injury is caused by an obviously dangerous product, the manufacturer may nevertheless be the party who can most efficiently implement cost-effective safety measures. Thus, it is arguable that the support of the representation rationale should not be necessary to the imposition of strict liability.¹²⁰ On the other hand, because of the importance of the deterrence and causation rationales,¹²¹ support of the representation rationale alone should not be a sufficient basis for the imposition of strict liability.

¹¹⁷ See *supra* notes 92-94 and accompanying text.

¹¹⁸ Several writers have recognized that such considerations of fairness must be viewed taking into consideration economic theory and other more utilitarian concerns. Epstein, *A Theory of Strict Liability*, 2 J. OF LEGAL STUD. 151, 151-52 (1973); G. CALABRESI, *THE COSTS OF ACCIDENTS*, 25 (1975) ("justice is a totally different order of goal from accident cost reduction. . . . It is not a goal but rather a constraint that can impose a veto on . . . the use of particular devices").

¹¹⁹ See *supra* note 107.

¹²⁰ See Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 305-16 (1977).

¹²¹ See *supra* notes 110-18 and accompanying text.

USING THE STRICT LIABILITY POLICY RATIONALES TO
EVALUATE ALTERNATIVE SOLUTIONS TO THE
SUCCESSOR LIABILITY PROBLEM

*Expansion of the Mere Continuation and De Facto Merger Exceptions to the
Traditional Corporate Rule of Successor Nonliability*

The traditional version of the mere continuation exception to the traditional rule¹²² is consistent with the causation rationale. When a court determines that a successor corporation is a mere continuation of its predecessor, it is looking beyond corporate form and finding that the successor is in fact the same business entity as the predecessor and should be treated as such. When a successor is held responsible for the liabilities of its predecessor under the mere continuation exception, it is held liable not for the acts of another entity but for its own acts during a previous corporate "life." The de facto merger exception to the traditional rule involves liability for acts of a predecessor corporate entity that has been absorbed into and has become a part of the successor, with the stockholders of the predecessor becoming stockholders of the successor.¹²³ Because of this commonality of ownership, under the de facto merger exception, as under the mere continuation exception, the successor and the predecessor are not wholly distinct and unrelated entities. Successor liability is therefore not liability for the unrelated acts of others.¹²⁴ Liability under these two exceptions is consistent with a broad interpretation of the causation rationale because the party held liable, or a part thereof, did play a role in causing the plaintiff's injury.

Courts which have expanded the de facto merger and mere continuation exceptions have done so by eliminating the requirement of commonality of ownership.¹²⁵ This change severs the relationship between the exceptions and the causation rationale, because it makes little sense to treat two corporations with entirely different ownership as entirely or partially the same entity. Once the two corporations are viewed as entirely distinct entities,

¹²² See *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 569, 264 A.2d 98, 106 (1970) for a statement of the traditional mere continuation exception.

¹²³ See *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801 (W.D. Mich. 1974).

¹²⁴ Continuity of shareholders is probably the most important element of the de facto merger exception. The justification for this exception is that

[t]he shareholders are the ones who ultimately enjoy the profits and suffer the losses of the corporation, and the shareholders of one corporation should not be able to move as a group to another corporation, enjoy the continuing profits of the same business the corporation performed before merger, but escape all possible losses that accumulated before merger.

Nguyen v. Johnson Mach. & Press Corp., 104 Ill. App. 3d 1141, 1148, 433 N.E.2d 1104, 1110 (1982).

¹²⁵ *E.g.*, *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873, 879-80 (1976); *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1153 (1st Cir. 1974).

successor liability under the expanded mere continuation and de facto merger exceptions is liability for the unrelated acts of a separate entity. In no sense did the successor play a role in the causation of the plaintiff's injury.

The deterrence rationale also provides more support for the traditional versions of the mere continuation and de facto merger exceptions than for expanded versions of these exceptions. The deterrence rationale's support for the mere continuation exception derives from the principle that a corporate entity should not be able to avoid the deterrent effect of strict liability merely by manipulation and alteration of the corporate form. Similarly, the de facto merger exception is supported by the deterrence rationale because such an exception is based on the principle that a corporate entity should not be able to avoid the legal consequences of a statutory merger merely by cleverly planning the merger so as to achieve all the results of a merger without coming within the scope of the merger statute. Included in these legal consequences is the continuing deterrent effect of the predecessor's tort liabilities that the merger statute requires the successor to assume. Because they eliminate the commonality of ownership, the expanded versions of these exceptions impose liability on successors in situations that do not resemble a statutory merger or a mere manipulation of corporate form, such as a change of name or state of incorporation. Rather, when the ownership is entirely different, the situation is a genuine sale of assets between two separate corporations.

Thus, the causation and deterrence rationales support the mere continuation and de facto merger exceptions as originally developed, but do not support expanded versions of these exceptions, such as those in *Turner v. Bituminous Casualty Co.*¹²⁶ and *Cyr v. B. Offen & Co.*¹²⁷ Although the cost spreading rationale supports these expanded exceptions, because strict liability should continue to be supported by both the causation and deterrence rationales,¹²⁸ these expanded exceptions should not be adopted.

The Product-Line Rule

The product-line rule of *Ray v. Alad Corp.*¹²⁹ involves liability without causation. This rule imposes liability on successor corporations that neither manufactured the product nor contributed in any way to the creation of the defect, to the distribution of the product, or to the plaintiff's injury. Successor liability under this broad rule is liability "for the totally indepen-

¹²⁶ 397 Mich. 406, 244 N.W.2d 873 (1976).

¹²⁷ 501 F.2d 1145 (1st Cir. 1974).

¹²⁸ See *supra* notes 108-18 and accompanying text.

¹²⁹ 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). See *supra* notes 22-23 and accompanying text for a description of the *Alad* rule.

dent acts of others."¹³⁰ Thus the causation rationale does not support the product-line rule.

The deterrence rationale provides little support for the product-line rule. Holding the successor liable for the predecessor's products cannot improve the quality of those products, as they have already been manufactured and distributed.¹³¹ Successor liability under the product-line rule can have only a minor deterrent effect on the successor's products, despite the fact that when the successor continues the product line he "is the only entity capable of improving the quality of the product."¹³² Even without liability the successor has as much incentive to improve the product as any other manufacturer because it knows it will be liable for the injuries caused by the products it manufactures. Imposing liability for a predecessor's products does nothing to increase the successor's incentive to produce safe products, because improvements in its products cannot reduce the successor's liability for the predecessor's products. Successor liability can influence the safety of the successor's products only by informing it of the existence of defects in the predecessor's products and of the costs of the injuries they cause. Where the successor continues the product line of the predecessor, this information may enable the successor to respond more effectively to the existing incentive, which is liability for its own products. The extent to which successor liability is needed in order to convey this information is questionable, since the successor already has an incentive to seek out such information because of liability for its own products.¹³³ This possible deterrent effect on the successor's products would only occur under the product-line rule, and could not justify a successor liability rule like that in *Turner v. Bituminous Casualty Co.*¹³⁴ in which there is no product line continuity, because information concerning defects in the predecessor's products is relevant only to improvement of the successor's products where the successor continues the predecessor's product line.

¹³⁰ *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977).

¹³¹ While it is true that successor liability may give the successor an incentive to warn owners of the predecessor's products of a known defect, thereby reducing the costs of accidents from the predecessor's products, the product-line rule is inappropriate for this purpose. Such a rule is too broad, in that it imposes liability even in situations where a warning would not be possible; yet it is too narrow, in that successors who do not continue the product line might also be able to give warnings, but are not held liable. A more appropriate rule for this aspect of deterrence is discussed *infra* notes 160-67 and accompanying text.

¹³² *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1154 (1st Cir. 1974).

¹³³ It is worthwhile for the successor to obtain information concerning the past safety record of the product line whenever this cost is less than the successor's estimate of the liabilities it might help him avoid by helping him to improve the product. On the other hand, successor liability might bring to the successor's attention some injuries caused by the predecessor's products occurring after the acquisition. These injuries might otherwise go unnoticed because the victims would go silently uncompensated instead of informing the successor of their occurrence by means of a lawsuit. Such information might well be too difficult and expensive for the successor to obtain otherwise.

¹³⁴ 397 Mich. 406, 244 N.W.2d 873 (1976).

The representation rationale provides some support for the product-line rule to the extent that the successor, by continuing the product line, implies that it is the same entity as the predecessor.¹³⁵ Otherwise the representation rationale does not support the product-line rule, because the successor made no representation concerning the quality of the predecessor's products.

Because it is not supported by the causation rationale, the product-line rule involves a major departure from existing tort law and strict liability principles. Support of the causation rationale should continue to be necessary for the imposition of strict liability.¹³⁶ The product-line rule, therefore, should not be adopted. Even if a different view of the importance of the causation rationale is taken, the deterrence rationale provides only weak and indirect support for the product-line rule. Consequently, the rule should probably still be rejected. Finally, since the support of the cost spreading and representation rationales alone should not be sufficient for the imposition of strict liability,¹³⁷ the support of these rationales should not be sufficient to justify the product-line rule.

Intermediate Successor Liability

In several cases¹³⁸ strict liability has been imposed upon corporations which bought a predecessor corporation's assets subsequent to that corporation's manufacture of the product that caused the plaintiff's injury, but sold the assets to a third corporation prior to the time of litigation. As under the product-line rule, liability of these "intermediate successor" corporations is not supported by the causation rationale.¹³⁹ Unlike the product-line rule, however, intermediate successor liability is not supported at all by the deterrence rationale. Even if the product line is being continued by the subsequent purchaser of the assets, liability of the intermediate successor for the predecessor's products cannot possibly influence the quality of the products being manufactured by this purchaser. Although such liability might inform the intermediate successor of defects in the product line, it is no longer in a position to use this information to improve the product line. And because the cost-spreading rationale alone should not be a sufficient justification for imposing strict liability,¹⁴⁰ intermediate successor liability should not be imposed.

¹³⁵ See *infra* notes 148-55 and accompanying text.

¹³⁶ See *supra* notes 108-18 and accompanying text.

¹³⁷ See *supra* text accompanying notes 121 & 108-13.

¹³⁸ *Trimper v. Harris Corp.*, 441 F. Supp. 346 (E.D. Mich. 1977); *Nieves v. Bruno Sherman Corp.*, 86 N.J. 361, 431 A.2d 826 (1981). The *Nieves* case is summarized *supra* notes 29-32 and accompanying text.

¹³⁹ See *supra* text accompanying notes 129-30.

¹⁴⁰ See *supra* text accompanying notes 108-13.

Successor Liability When Predecessor is Still Available as a Defendant

In most successor liability cases the predecessor corporation was not available as a defendant, having been dissolved prior to the time of litigation.¹⁴¹ In the recent case of *Tift v. Forage King Industries*,¹⁴² however, the Supreme Court of Wisconsin imposed liability on a successor corporation under a greatly expanded mere continuation exception despite the fact that the predecessor that manufactured the defective product, a sole proprietor, was alive and available as a defendant.¹⁴³

Strict liability policies do not justify successor liability in the *Tift* situation.¹⁴⁴ Liability of the successor corporation is supported by a weak and indirect deterrent effect on the successor's products, which could occur only if the successor continues the predecessor's product line.¹⁴⁵ Also, such successor liability is strongly supported by the cost spreading and representation rationales. These two rationales alone, however, should not be sufficient to justify strict liability.¹⁴⁶

Strict liability policies, however, do support liability of the predecessor that manufactured the defective product, whenever that party is available as a defendant. The causation rationale supports the predecessor's liability because the product would have been defective when it left the control of the manufacturer.¹⁴⁷ The original deterrent purpose of strict liability, to hold manufacturers liable for injuries caused by their own products to provide incentives for the production of safer products, also supports liability of a predecessor who is available as a defendant. Finally, fairness dictates that a predecessor should not be permitted to escape liability for its own defective products merely by selling its business name.

Liability Based on a Representation of Enterprise Continuity

Several cases suggest that successor liability could be based on the successor's representation of enterprise continuity.¹⁴⁸ Under this theory, a suc-

¹⁴¹ *E.g.*, *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). The *Alad* court specifically mentioned this as one of the reasons for successor liability. *See supra* text accompanying note 23.

¹⁴² 108 Wis. 2d 72, 322 N.W.2d 14 (1982).

¹⁴³ A similar situation may arise where the predecessor is a corporation that sells only part of its assets to the successor and then continues as a viable operating corporation. *See Amader v. Pittsburgh Corning Corp.*, No. 79-4546 (E.D. Pa., July 26, 1982).

¹⁴⁴ *See supra* notes 122-37 and accompanying text.

¹⁴⁵ *See supra* notes 131-34 and accompanying text.

¹⁴⁶ *See supra* text accompanying notes 108-13 & 119-21.

¹⁴⁷ *See Tift*, 108 Wis. 2d at 77, 322 N.W. 2d at 16 (allegedly defective product was manufactured by predecessor, the sole proprietorship).

¹⁴⁸ This theory was explicitly stated in *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 426, 244 N.W.2d 873, 882 (1976). It is referred to less explicitly in some other cases which emphasize the benefits to the successor from exploiting the goodwill of the predecessor by appearing to be the same enterprise. *E.g.*, *Ray v. Alad Corp.*, 19 Cal. 3d 22, 34, 560 P.2d 3, 10-11, 136 Cal. Rptr. 574, 582 (1977); *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1154 (1st Cir. 1974).

cessor would be liable for injuries caused by its predecessor's products if it represents to the public that it is the same business enterprise as the predecessor. Although this theory substantially overlaps with the product-line rule, it may lead to a different result in a situation in which the successor does not continue the product line, but uses the predecessor's name or trademark, thereby representing the enterprise's continuity.¹⁴⁹ This representational theory is analogous to the trademark licensor cases discussed above¹⁵⁰ in that it involves a representation of manufacturer corporate identity rather than of product quality, but it is distinguishable in two ways. First, in the trademark cases liability was supported by the deterrence rationale,¹⁵¹ whereas successor liability based solely on this representational theory is not supported by the deterrence rationale.¹⁵² Second, in those cases it was reasonable to assume that buyers had relied to some extent on the trademark in deciding to buy the product. In successor liability cases, however, the representation of the successor's identity with the predecessor occurs after the sale has been made by the predecessor. Consequently, the buyer could not have relied upon this representation in deciding to buy the product.¹⁵³ Reliance is important because it ties the plaintiff's injury to the actions of the successor, so that liability is supported by the causation rationale.¹⁵⁴ Without such reliance, liability is not supported by the causation rationale. Therefore, successor liability based solely on this representational theory can only be supported by the cost spreading and representation rationales. Because these rationales alone should not be sufficient support for the imposition of strict liability,¹⁵⁵ this theory should be rejected.

Liability Under a Bona Fide Purchaser Rule

One reason successor liability might be necessary to achieve deterrence is that otherwise corporate acquisitions could be used to avoid a corporation's known strict liability problems. The seller would get a "windfall" in

¹⁴⁹ Compare *Gee v. Tenneco, Inc.*, 615 F.2d 857, 864 (9th Cir. 1980) (fundamental requirement for successor liability is exploitation of predecessor's goodwill, not continuation of the precise product line) with *Savini v. Kent Mach. Works, Inc.*, 525 F. Supp. 711 (E.D. Pa. 1981) (use of predecessor's trademark and goodwill is not sufficient basis for successor liability when there is no product line continuity); *Cody v. Sheboygan Mach. Co.*, ___ Wis. 2d ___, 321 N.W.2d 142 (1982) (use of predecessor's name and place of business not sufficient basis for successor liability when there is no product line continuity).

¹⁵⁰ See *supra* notes 104-06 and accompanying text.

¹⁵¹ See *supra* notes 104 & 106.

¹⁵² This is for the reasons stated *supra* text accompanying notes 131-34.

¹⁵³ See Note, *Products Liability: Developments in the Rule of Successor Liability for Product-Related Injuries*, 12 U. MICH. J.L. REF. 338 (1979).

¹⁵⁴ If the plaintiff relied on the representation in deciding to buy the product, then the representation was a cause of the plaintiff's injury. Without the representation the plaintiff might not have bought the product, thereby avoiding the injury.

¹⁵⁵ See *supra* text accompanying notes 108-13 & 119-21.

the form of a higher price than the true worth of the business and the corporate buyer would get a fresh start without liability, just as if it were introducing a new product.¹⁵⁶ This would undermine the policy of deterrence by facilitating the avoidance of liability. To the extent this is the reason for the product-line rule, a different rule of successor liability, which would not discourage acquisitions, should be adopted.¹⁵⁷ This rule would provide for successor liability subject to a bona fide purchaser exception, limiting successor liability to acquisitions in which the successor knew or should have known of liability problems.¹⁵⁸ Liability would be limited to injuries caused by the defects that were known or should have been known. This approach would require less of a departure from the causation rationale than other successor liability rules because although the successor did not cause the defect, by participating in the transaction it knowingly or negligently contributed causally to the plaintiff's inability to recover from the predecessor. Thus, this rule would tie liability to some wrongful conduct of the successor and would deter this conduct. This rule of successor liability subject to a bona fide purchaser exception is supported by the policies of strict liability, including the causation and deterrence rationales, as well as by the policies underlying the traditional rule of nonliability.¹⁵⁹

Liability Under a Duty to Warn Rule

A number of courts have stated in dictum that under certain conditions a successor would be held liable for injuries caused by the predecessor's products when the successor failed to warn owners of those products of known defects, and those defects caused the injuries.¹⁶⁰ These courts have indicated that they would follow the traditional tort law approach to nonfeasance liability, imposing liability for a failure to act only if there is a duty to act.¹⁶¹ Also, no duty of a successor to warn owners of the predecessor's products would exist solely because of the successor's knowledge of a defect and of the location of the product. These courts have suggested that more of a relationship between the successor and the product's owner is required before the successor would have a duty to warn,

¹⁵⁶ See *supra* note 23.

¹⁵⁷ See *supra* notes 59-66 and accompanying text.

¹⁵⁸ For more detail on the proposed rule, see *supra* note 69.

¹⁵⁹ See *supra* text accompanying notes 69-70.

¹⁶⁰ *E.g.*, *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977); *Shane v. Hobam, Inc.*, 332 F. Supp. 526 (E.D. Pa. 1971); *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 356 A.2d 458 (1976).

¹⁶¹ There is usually only a duty to act where the defendant has a special relation to the plaintiff of "actual or potential economic advantage to the defendant." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 339 (4th ed. 1971). This relation must be such that the defendant "has begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him." *Id.* at 340.

such as service of the product or at least coverage of the product under a service contract.¹⁶²

The imposition of a duty to warn on the successor is an alternative approach to successor liability that is consistent with the causation rationale. The successor's failure to warn would contribute causally to a plaintiff's injury in that the injury probably would not have occurred had a warning been given. Unlike many of the broader rules of successor liability discussed above, liability under the duty to warn rule, is based on something within the control of the successor.¹⁶³ If it knows of a defect or the likelihood of a defect, does not warn of the defect, and is then held liable, the successor is not held liable for the independent acts of others, but for failure to make its own conduct conform to a legal standard. A stricter duty to warn rule than that suggested above¹⁶⁴ would still have this advantage over the product-line rule or an expanded continuity rule, even if it extended beyond the traditional limitation on nonfeasance liability.¹⁶⁵

A strict duty to warn rule is also supported by the deterrence rationale. A successor that knows of a defect or the likelihood of a defect is the party most likely to be able to reduce the costs of accidents cost effectively by warning the product owners. Thus, successor liability for failure to warn will contribute to the goal of the deterrence rationale.¹⁶⁶ Expansion of successor liability through a strict duty to warn rule is therefore desirable because it is supported by the causation and deterrence rationales, as well as by the cost-spreading rationale.¹⁶⁷

CONCLUSION

Recent cases indicate that courts are expanding the scope of liability of successor corporations for defective products manufactured by corporate

¹⁶² *E.g.*, *Travis v. Harris Corp.*, 565 F.2d 443, 449 (7th Cir. 1977). *But cf.* *Pelc v. Bendix Mach. Tool Corp.* 111 Mich. App. 343, 358, 314 N.W.2d 614, 621 (1981) (duty to warn if successor is given some control of product or if successor becomes aware of a defect).

¹⁶³ Under the expanded mere continuation and de facto merger exceptions, and the product-line rule, successor liability is based on the predecessor's actions in producing a defective product, something not within the control of the successor. *See supra* notes 126 & 130 and accompanying text.

¹⁶⁴ *See supra* text accompanying notes 160-62.

¹⁶⁵ *See supra* note 161 and accompanying text. A stricter duty to warn rule would impose a duty to warn on a successor simply on the basis of knowledge of a defect or the likelihood of a defect in the predecessor's products, without requiring any special relationship between the successor and the owner of the product. The successor would be required to use all reasonable methods to locate the product owners and communicate the warning to them.

¹⁶⁶ *See supra* notes 86-88 and accompanying text.

¹⁶⁷ This rule probably would compensate fewer plaintiffs than expanded mere continuation and de facto merger exceptions, the product-line rule, or the enterprise continuity representation rule, because there would be many situations where the successor would not have a duty to warn because it would not know of any defects or likely defects. This rule therefore serves the cost-spreading function less effectively, because it balances the cost-spreading rationale against the causation and deterrence rationales.

predecessors. This trend is exemplified by the fact that courts are finding liability in new factual situations by using approaches that go beyond the original exceptions to the traditional rule of nonliability. In expanding the scope of successor liability, however, no court has considered the policies underlying the traditional rule to ascertain their ultimate effect on the application of this rule to strict liability claims. Three policies, based on contract law, tort law, and economically desirable commercial transactions, all support a successor's nonliability in products liability claims.

Four rationales which support strict products liability combine to allow findings of successor liability under the original exceptions to the traditional rule. Two rationales crucial to strict liability, causation and deterrence, however, support expanded versions of successor liability only in two instances: when there exists a strict duty to warn and when successors have actual or constructive notice of defects in a predecessor's products at the time of the acquisition. Also, policies underlying the traditional rule tend to support liability in the latter situation, which is analogous to a bona fide purchaser doctrine. Consequently, courts that desire to expand the liability of successor corporations should first give appropriate consideration to policies underlying the traditional rule and to strict products liability rationales.

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